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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 179

SOUTH BUFFALO RAILWAY COMPANY,
Appellant,

v.

GERTRUDE SLOAN AHERN and NEW YORK STATE WORKMEN'S COMPENSATION BOARD,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT

ALBERT R. CONNELLY,
Counsel for Appellant,
15 Broad Street,
New York 5, N. Y.

HOYT A. MOORE,
JOSEPH W. MARLOW,
Of Counsel.

November 24, 1952.

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OPINIONS BELOW

The memorandum decision of the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (R. 95), has been reported in 277 App. Div. 1067 (1950). The opinion of the Court of Appeals of the State of New York (R. 98) has been reported in 303 N. Y. 545 (1952).

JURISDICTION

The final judgment of the Court of Appeals of the State of New York, a review of which is here sought, was entered in the office of the Clerk of said Court on March 13, 1952 (R. 97). The petition for appeal was presented and the appeal was allowed on June 5, 1952 (R. 125).

The jurisdiction of this Court rests upon the provisions of Section 1257(2) of Title 28, United States Code (Supp. V).

The opinion of the Court of Appeals of the State of New York (R. 98) shows that the validity of a state statute, namely, Section 113 of the New York State Workmen's Compensation Law, was drawn into question in that Court as being repugnant to the Constitution and laws of the United States (particularly the Federal Employers' Liability Act) and that the decision of the Court of Appeals was in favor of the validity of such Section.

As appears from the Record in this case (R. 5, 8, 9, 26, 27, 88-91, 95) and the opinion of the Court of Appeals of the State of New York (R. 98), the appellant has contended before the New York State Workmen's Compensation Board (hereinafter called the Board) and throughout the courts of the State of New York that, because of the exclusive provisions of the Federal Employers' Liability Act, the Board did not have any jurisdiction over the subject-matter of this proceeding and that the right of the appellant to question the jurisdiction of the Board had not been waived.

STATUTES INVOLVED

The statute of the State of New York the validity of which is involved is Section 113 of the New York State Workmen's Compensation Law (64 McKinney's Consolidated Laws of New York (1946) § 113), which is as follows:

> "§ 113. **Interstate commerce.** The provisions of this chapter [that is, the New York State Work-

men's Compensation Law] shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

The pertinent provisions of the Federal Employers' Liability Act (Act of Apr. 22, 1908, c. 149, 35 Stat. 65; as amended by the Act of Aug. 11, 1939, c. 685, 53 Stat. 1404; 45 U. S. C. §§ 51 *et seq.*) are as follows:

"SEC. 1. That every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of

kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended.

"

"SEC. 5. That any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Act, shall to that extent be void: *Provided*, That in any action brought against any such common carrier under or by virtue of any of the provisions of this Act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

"SEC. 6. That no action shall be maintained under this Act unless commenced within three years from the day the cause of action accrued.

"

STATEMENT

This proceeding involves the validity of an award of disability compensation which was made by a Referee of the Board on January 26, 1949, under the provisions of the New York State Workmen's Compensation Law against the appellant, a common carrier by railroad engaged in interstate commerce (R. 21). The Board denied the application of the appellant for review or rehearing of that award and held that the appellant had waived its right to question the jurisdiction of the Board (R. 7-9). The decision of the Board was affirmed on appeal by the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department (R. 95), and by the Court of Appeals of the State of New York (R. 98).

On January 15, 1945, Thomas J. Ahern (the deceased husband of appellee Gertrude Sloan Ahern), who had been employed as a brakeman by the appellant, filed a claim for disability compensation with the Board under the provisions of the New York State Workmen's Compensation Law (R. 28). Such claim was predicated upon a coronary occlusion which Ahern allegedly suffered on July 1, 1944, when he threw a switch on the railroad of the appellant (R. 29). In accordance with Board procedure, the appellant filed with the Board a notice of controversy dated February 1, 1945, in which the appellant first controverted the claim on grounds of accident and causal relation, and expressly reserved the right to controvert it for such other reasons as might later appear (R. 33). After hearings before a Referee of the Board at which evidence was adduced on the issues of accident and causal relation (R. 35-83), an award was made in favor of Ahern on September 24, 1945, for dis-

ability compensation in respect of temporary total disability for the 48-2/6 weeks from July 1, 1944, to June 5, 1945, at the rate of $28 per week, and the case was continued for consideration of the extent and length of disability subsequent to June 5, 1945, and "all other issues" (R. 12).

On October 11, 1945, the appellant filed with the Board an application for review of the decision that Ahern suffered an accidental injury arising out of and in the course of his employment (R. 24). That application was denied by the Board on November 15, 1945 (R. 16). Thereafter, two additional interlocutory awards of disability compensation were made by a Referee of the Board, one on January 10, 1946, for the 31 weeks from June 5, 1945, to January 8, 1946 (R. 19), and the other on February 5, 1947, for the 56 weeks from January 8, 1946, to February 4, 1947 (R. 20).

At a hearing before a Referee of the Board on January 18, 1949, with reference to a final award of disability compensation (Ahern having died on January 3, 1949), the appellant challenged the jurisdiction of the Board and offered proof on that issue (R. 88-89, 91). The Referee ruled, however, that the appellant could not controvert the claim on the ground that the Board did not have any jurisdiction of it; that "once having taken jurisdiction in the matter, we continue jurisdiction"; and that thereafter the question of jurisdiction "is *res adjudicata*" (R. 89).

On January 26, 1949, the Referee made an award of disability compensation for two periods, one for the 97-5/6 weeks from February 4, 1947, to December 20, 1948, and the other for the two weeks from December 20, 1948, to January 3, 1949 (R. 21). In accordance with the previous award of February 5, 1947 (R. 20), the appellant had con-

tinued to make periodic payments of compensation to Ahern at the prescribed rate until December 20, 1948, so that only $56 remains to be paid (R. 6, 90, 101).

On or about February 15, 1949, the appellant filed with the Board an application for review or rehearing of the decision and award of the Referee on the ground that at the time of the alleged accident Ahern was employed by the appellant in interstate commerce; that on that account the case came within the provisions of the Federal Employers' Liability Act; and that, therefore, the Board was without jurisdiction of the claim (R. 26). The undisputed fact before the Board on such application showed that Ahern was employed by the appellant "in the movement of railroad cars in interstate commerce" (R. 27-28).

On May 2, 1949, the Board denied the application of the appellant (R. 7) and ruled that in its opinion (stated in its Memorandum of Decision dated April 21, 1949) the appellant had been "guilty of laches" and by its conduct had "waived its right to question the jurisdiction of the Workmen's Compensation Law" (R. 8-9). Hence, the Board refused to consider evidence that Ahern and the appellant were engaged in interstate commerce at the time of the alleged accident and refused to review the rulings of the Referee (R. 8-9).

On appeal, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, held in a brief memorandum decision (R. 95) that the appellant had waived its right to question the jurisdiction of the Board.

On the ground that the construction of the Constitution of the United States was directly involved, the appellant appealed as of right to the Court of Appeals of the State

of New York under the provisions of Section 588(1)(a) of the New York Civil Practice Act (R. 92, 98).

On March 13, 1952, the Court of Appeals (one judge dissenting) affirmed the order of the Appellate Division (R. 97). In its opinion (R. 98) the Court of Appeals held that Section 113 of the New York State Workmen's Compensation Law was not repugnant to the Constitution and laws of the United States (particularly the Federal Employers' Liability Act) and that, even though there was not an express agreement between the parties settling their dispute, the acts of the parties showed that they "intended that the board's determinations be taken 'in substitution of the litigation permitted by the Federal Acts'" (R. 114). In other words, the Court held that the parties had waived their Federal rights and remedies in accordance with the provisions of Section 113 of the New York State Workmen's Compensation Law and that, therefore, the appellant was precluded from raising the question of the lack of jurisdiction of the Board over the subject-matter of the claim.

SPECIFICATION OF ERRORS

The Court of Appeals of the State of New York erred:

1. In deciding in favor of the validity of Section 113 of the New York State Workmen's Compensation Law as applied in this case, as against contentions of the appellant that the provisions of Section 8 of Article I and Clause 2 of Article VI of the Constitution of the United States and the provisions of the Federal Em-

ployers' Liability Act forbade the application of such Section 113 in this case.

2. In holding that the appellant, by making payment of interlocutory awards of disability compensation under the New York State Workmen's Compensation Law, and the employee, by accepting such payments, entered into an agreement of waiver under Section 113 of such Law, which was valid as a settlement or compromise of a cause of action for personal injury under the Federal Employers' Liability Act.

SUMMARY OF ARGUMENT

I

The appellant contends that Section 113 of the New York State Workmen's Compensation Law, as applied by the Court of Appeals in this case, is in irreconcilable conflict with the Commerce Clause (Article I, Section 8, Clause 3) of the Constitution of the United States and with the Federal Employers' Liability Act. If the construction which the Court of Appeals has given to Section 113 should be allowed to stand, it would permit the Board to assume jurisdiction over claims arising out of the injuries to employees of carriers by railroad sustained while both were engaged in interstate commerce. The field of liability in such cases has been pre-empted by the Congress by enacting the Federal Employers' Liability Act. The exclusive character of that Act derives from the provisions of the Constitution of the United States, Article I, Section 8, Clauses 3 and 18, and Article VI, Clause 2.

The purpose of the Congress in enacting the Federal Employers' Liability Act was to prescribe a uniform rule in respect of the liability of carriers by railroad for injuries to their employees while engaged in interstate commerce. In this case, however, the Court of Appeals, applying Section 113, has required the appellant to submit to the jurisdiction of a statutory tribunal of the State of New York and, in so doing, has permitted the State to interfere with the uniform application of that Act which the Congress intended.

II

The appellant contends that the finding by the Court of Appeals of an accord and satisfaction and release of a cause of action under the Federal Employers' Liability Act cannot be supported in law. Admittedly, a cause of action under the Federal Employers' Liability Act may be settled by an accord and satisfaction or by a release, but the facts from which the Court of Appeals has implied a settlement "agreement" amounting to such an accord and satisfaction or release in this case fall far short of the standards required by this Court for finding a valid agreement of that kind.

The validity of a satisfaction and release of a cause of action under the Federal Employers' Liability Act raises a Federal question to be determined by Federal law. The Congress could not have intended that such a cause of action should be settled by submission to a State workmen's compensation tribunal, because thereby the uniform application of Federal law would be interfered with.

ARGUMENT

POINT I

SECTION 113 OF THE NEW YORK STATE WORKMEN'S COMPENSATION LAW, AS APPLIED BY THE COURT OF APPEALS IN THIS CASE, IS IN IRRECONCILABLE CONFLICT WITH THE COMMERCE CLAUSE OF THE CONSTITUTION AND WITH THE FEDERAL EMPLOYERS' LIABILITY ACT.

A. Section 113, as Construed by the Court of Appeals in This Case, Would Permit the Board to Assume Jurisdiction over the Subject-Matter of a Claim Which Is Subject to the Exclusive Provisions of the Federal Employers' Liability Act.

The predecessor of Section 113 was enacted in 1913 as Section 114 of the New York State Workmen's Compensation Law (New York Laws of 1913, c. 816, as amended and re-enacted by New York Laws of 1914, c. 41) and was as follows:

> "§ 114. **Interstate commerce.** The provisions of this chapter shall apply to employers and employees engaged in intrastate, and also interstate or foreign commerce, for whom a rule of liability or method of compensation has been or may be established by the congress of the United States, only to the extent that their mutual connection with intrastate work may and shall be clearly separable and distinguishable from interstate or foreign commerce, except that such employer and his employees working only in this state may, subject to the approval and in the manner provided by the [workmen's compensation] commission and so far as not forbidden by any act of congress, accept and become bound by the provisions of this chapter in like

> manner and with the same effect in all respects as provided herein for other employers and their employees."

Effective July 1, 1922 (New York Laws of 1922, c. 615), and subsequent to the decisions of this Court in *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147 (1917), and *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), both of which involved Section 114 as quoted above, Section 114 was renumbered Section 113 and amended by substituting for the latter part of Section 114 as so renumbered, beginning with the word "except", the following proviso:

> "provided that awards according to the provisions of this chapter may be made by the board in respect of injuries subject to the admiralty or other federal laws in case the claimant, the employer and the insurance carrier waive their admiralty or interstate commerce rights and remedies, and the state insurance fund or other insurance carrier may assume liability for the payment of such awards under this chapter."

That amendment was adopted by the New York State Legislature in the form proposed by a joint committee appointed by it to recodify and revise the Workmen's Compensation Law, pertinent extracts from the report of which are set forth in Appendix A. Such report (*post*, p. 28) shows that the committee was primarily concerned with the confused jurisdictional situation which prevailed with respect to maritime and longshore work following the decisions of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917), *supra*, and *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149 (1920). Section 113 nevertheless is by

its terms applicable to injuries to employees of carriers by railroad while engaged in interstate commerce and authorizes the Board to assume jurisdiction and make awards in cases where the employer and the employee (and the insurance carrier, if any) "waive" their interstate commerce rights and remedies.

The Court of Appeals in this case has gone far beyond the express language of Section 113 and the intent of the New York Legislature in enacting it. It is not denied that the claim involved in this case is one for personal injury which is subject to the Federal Employers' Liability Act. Nevertheless, the Court of Appeals has held that Section 113 authorized the Board to take jurisdiction of such claim, if the parties agreed thereto, and that an agreement that the Board should have jurisdiction of the claim is to be implied or presumed from the payment and acceptance of three interlocutory awards of disability compensation and a continuance of payments in accordance with the third such award.

B. Section 113, as Constructed in This Case, Interferes with the Uniform Application of the Federal Employers' Liability Act and Compels Submission of a Claim Thereunder to the Jurisdiction of a State Board in a Manner Proscribed by the Congress.

The Court of Appeals in its opinion in this case purported to recognize the exclusiveness of the Federal Employers' Liability Act, saying that the State of New York "is powerless to invade the field of liability as to injuries to railroad employees engaged in interstate commerce" (R. 102). It nevertheless did in effect permit the State of New York to invade that field by holding that the parties through

their acts had waived their interstate commerce rights and remedies (that is, the rights and remedies established by the Federal Employers' Liability Act) and that, therefore, the Board, under the provisions of Section 113 of the New York State Workmen's Compensation Law, had jurisdiction to make the award in question.

The Congress, by enacting the Federal Employers' Liability Act, provided a proper and eminently desirable solution of the then vexing and confused problem which had arisen out of the application of widely divergent State laws to interstate carriers by railroad and established a uniform rule prescribing the liability of such carriers to their employees on account of personal injuries sustained while they were engaged in interstate commerce. *Second Employers' Liability Cases*, 223 U. S. 1 (1912); *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147 (1917), *supra; Erie R. R. Co.* v. *Winfield*, 244 U. S. 170 (1917). This Court has consistently recognized the soundness of that principle and has insisted upon its uniform application. *Brown* v. *Western R. of Alabama*, 338 U. S. 294 (1949); *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359 (1952).

As stated by this Court in the *Second Employers' Liability Cases* (223 U. S. at 51):

> "We are not unmindful that that end [the avoidance or prevention of negligence] was being measurably attained through the remedial legislation of the several States, but that legislation has been far from uniform, and it undoubtedly rested with Congress to determine whether a national law, operating uniformly in all the States upon all carriers by railroad engaged in interstate commerce, would better subserve the needs of that commerce. . . ."

It is settled beyond question that the liabilities and obligations of railroad carriers to make compensation for personal injuries suffered by their employees while engaged in interstate commerce are regulated by the Federal Employers' Liability Act and that, the Congress having thus fully covered the subject, State regulation is thereby prohibited, even in respect of injuries occurring without the fault of the employer. The exclusive character of that Act derives from the provisions of the Constitution of the United States, Article I, Section 8, Clauses 3 and 18, and Article VI, Clause 2. *New York Central R. R. Co.* v. *Winfield*, 244 U. S. 147 (1917), *supra*.

In that case the accident occurred without negligence of the carrier. The injured employee sought compensation for his injury under the New York Workmen's Compensation Law, and an award was made to him by the State Commission. On appeal the award was affirmed by the Appelkate Division of the Supreme Court and by the New York Court of Appeals. This Court, however, held that such award could not be sustained and, in so doing, emphasized the requirement of uniformity in such cases. As showing what the Congress intended, and, therefore, what the Act does, this Court quoted from the House report recommending enactment of the bill which became the Federal Employers' Liability Act, H. R. Rep. No. 1386, 60th Cong., 1st Sess. (1907), as follows (244 U. S. at 150):

> "'It is intended in its scope to cover all commerce to which the regulative power of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with reference to the liability of common carriers to their employees. . . . A Federal statute of this character will supplant

> the numerous State statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union, and the legal status of such employer's liability for personal injuries instead of being subject to numerous rules will be fixed by one rule in all the States.' "

This Court accordingly held that a State was not at liberty to disturb the uniformity which the Federal Employers' Liability Act was designed to effect and to interfere with its operation and, in so doing, said (244 U. S. at 153):

> "Only by disturbing the uniformity which the act is designed to secure and by departing from the principle which it is intended to enforce can the several States require such carriers to compensate their employees for injuries in interstate commerce occurring without negligence. But no State is at liberty thus to interfere with the operation of a law of Congress. . . ."

It is also settled beyond question that a State may not compel submission to the jurisdiction of a State workmen's compensation tribunal in respect of an injury to a railroad employee while engaged in interstate commerce. *Erie R. R. Co. v. Winfield,* 244 U. S. 170 (1917), *supra.* In its opinion (R. 108) the Court of Appeals attempted to distinguish this case from the decision of this Court in the *Erie* case, wherein application of the New Jersey workmen's compensation statute was sought. There is not, however, any valid difference in effect between that statute and Section 113, as construed and applied by the Court of Appeals in this case.

That statute (New Jersey Laws of 1911, c. 95) consists of two sections. Section I dealt with liability founded upon

negligence, and Section II with liability in the absence of negligence. Section II, in pertinent part, is as follows:

"7. When employer and employe shall by agreement, either express or implied, as hereinafter provided, accept the provisions of section II of this act, compensation for personal injuries to or for the death of such employe by accident arising out of and in the course of his employment shall be made by the employer without regard to the negligence of the employer, according to the schedule contained in paragraph eleven, in all cases [with certain exceptions not here pertinent].

"8. Such agreement shall be a surrender by the parties thereto of their rights to any other method, form or amount of compensation or determination thereof than as provided in section II of this act, and an acceptance of all the provisions of section II of this act, and shall bind the employe himself and for compensation for his death shall bind his personal representatives, his widow and next of kin, as well as the employer, and those conducting his business during bankruptcy or insolvency.

"9. Every contract of hiring made subsequent to the time provided for this act to take effect shall be presumed to have been made with reference to the provisions of section II of this act, and unless there be as a part of such contract an express statement in writing, prior to any accident, either in the contract itself or by written notice from either party to the other, that the provisions of section II of this act are not intended to apply, then it shall be presumed that the parties have accepted the provisions of section II of this act and have agreed to be bound thereby. In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor.

> "10. The contract for the operation of the provisions of section II of this act may be terminated by either party upon sixty days' notice in writing prior to any accident."

In the *Erie* case, this Court again held that the Federal Employers' Liability Act "establishes a rule or regulation which is intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive" (244 U. S. at 172) and, accordingly, that the New Jersey courts had failed to give controlling effect to the provisions of that Act. In so doing, this Court said (244 U. S. at 173-74):

> ". . . There was no express agreement in this instance and there is no basis for regarding the carrier as in any way bound by this part of the statute, save as it provides that an agreement to be bound by it shall be presumed in the absence of a declaration to the contrary. But such a presumption cannot be indulged here, and this for the reason that by the federal act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of state laws. It is beyond the power of any State to interfere with the operation of that act, either by putting the carriers and their employees to an election between its provisions and those of a state statute or by imputing such an election to them by means of a statutory presumption. . . ."

By enacting Section 113, in total disregard of the intention of the Congress that the Federal Employers' Liability Act should establish a uniform rule of liability throughout the States, the New York Legislature has attempted not only to confer upon its Workmen's Compensation Board the

power to deal with claims for personal injuries of employees while engaged in interstate commerce, but also to provide compensation for such injuries in cases in which, as shown by the *Erie* case, liability was not intended by the Congress. By its decision in this case the Court of Appeals has attempted to give effect to Section 113 of the New York Workmen's Compensation Law just as the New Jersey courts attempted to give effect to the New Jersey statute which is quoted above. In this case, the Court of Appeals has decided not only that an agreement of waiver described in Section 113 is effective, but also that a binding settlement "agreement" may be implied or presumed from the payment and acceptance of interlocutory awards of disability compensation. From the "agreement" so implied or presumed, that Court has held that the parties elected to be bound by the provisions of the New York State Workmen's Compensation Law and have waived any rights and remedies under the Federal Employers' Liability Act.

It is important to note that, in enacting their workmen's compensation laws, all the States, except six (possibly three others),* have respected the will of the Congress and have meticulously included provisions exempting from the application of those laws claims for personal injuries of employees when engaged in interstate commerce. In Appendix B hereto the relevant provisions, if any, of the workmen's compensation laws of the States other than New York are cited.

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*The six States are New York, with which we are herein dealing, and Illinois, New Jersey, Pennsylvania, Rhode Island and Wisconsin, whose laws do not contain any provision with reference to jurisdiction of claims of employees engaged in interstate commerce. The other three are Kentucky, Maryland and Michigan, whose laws are not clear on the point.

It is obvious that Section 113 as the Court of Appeals has applied it in this case has the effect of conferring jurisdiction on the Board and that that Section as so applied may be used as a ready vehicle for circumventing the jurisdictional limitations upon the State of New York and its statutory tribunals which, as shown above, are prescribed by the Constitution and laws of the United States. Under the decision of the Court of Appeals in this case the mere payment and acceptance of a single interlocutory award of workmen's compensation may be construed to have the force of a binding agreement by the parties to submit themselves to a tribunal which is completely without jurisdiction and whose rule of liability is totally at variance with the uniform rule of liability which the Congress by enacting the Federal Employers' Liability Act has established for carriers by railroad.

The dangers which are pointed out above were clearly expressed by Judge Fuld in his dissenting opinion in the Court of Appeals in this case, as follows (R. 120-21):

> ". . . All the factors which are stressed in the majority opinion as predicates for implying such an agreement in this case are in essence to be found in almost any case in which one or more temporary awards of compensation have been paid and accepted. In other words, the mere fact that even one temporary award has been paid and accepted without protest is apparently now to be invested with the force of a binding commitment by the parties to submit themselves to the aegis of a tribunal completely without jurisdiction in contravention of the settled principle that neither waiver nor the consent or agreement of the parties can serve to confer jurisdiction where none exists."

It is fundamental that a determination which is made by a tribunal that is without jurisdiction of the subject-matter is a nullity and that the lack of jurisdiction may not be waived or overcome by the consent or agreement of the parties. *Mitchell* v. *Maurer*, 293 U. S. 237, 244 (1934); *United States* v. *Corrick*, 298 U. S. 435, 440 (1936). The lack of jurisdiction in this case derives from the controlling provisions of a Federal law. Since the jurisdiction of the State of New York over the subject-matter of this case is thereby excluded, it follows that the State is powerless by its own fiat to confer jurisdiction on its tribunals as it has sought to do through the vehicle of Section 113 as construed and applied in this case.

POINT II

PRINCIPLES OF ACCORD AND SATISFACTION AND RELEASE OF A CAUSE OF ACTION UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT WHICH WERE APPLIED BY THE COURT OF APPEALS IN THIS CASE ARE NOT APPLICABLE.

The Court of Appeals, in construing Section 113 as it has in this case, has incorrectly applied the decisions of this Court with respect to the settlement and compromise of actions for personal injury under the Federal Employers' Liability Act. *Duncan* v. *Thompson*, 315 U. S. 1 (1942); *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625 (1948).

In the *Callen* case it was held that Section 5 of the Federal Employers' Liability Act (quoted *supra* at p. 4) does not operate to prevent an otherwise valid release of a claim by an individual engaged in interstate commerce and that "Where controversies exist as to whether there is lia-

bility, and if so for how much, Congress has not said that parties may not settle their claims without litigation" (332 U. S. at 631). And in *Boyd* v. *Grand Trunk W. R., Co.*, 338 U. S. 263, 266 (1949), the agreement in the *Callen* case was characterized as a "full compromise enabling the parties to settle their dispute without litigation." There is a vast and controlling distinction, however, between a full settlement effected in writing by the parties with full regard for their rights under the Federal Employers' Liability Act, such as the settlement which was involved in the *Callen* case, and an implied "agreement" to submit to the jurisdiction of the Board, such as the Court of Appeals has found in this case.

The Court of Appeals in this case held that the payment and acceptance of interlocutory awards made by the Board constituted a settlement "agreement" which was in effect a satisfaction and release of the cause of action for personal injuries under the Federal Employers' Liability Act and that that "agreement" precluded the appellant from raising the question of lack of jurisdiction of the Board over the subject-matter of the claim which is here involved. The court cited as authority for its holding the case of *Heagney* v. *Brooklyn Eastern Dist. Terminal*, 190 F. 2d 976 (2d Cir. 1951), *cert. denied*, 342 U. S. 920 (1952). The facts in that case, however, are very different from the facts in this case, and, even if it be admitted that that case was correctly decided (which the appellant does not admit), it is not authority for the decision of the Court of Appeals in this case.

In the *Heagney* case the plaintiff brought an action in a United States District Court under the provisions of the Federal Employers' Liability Act to recover damages for personal injuries. A few days after the accident in which

the plaintiff was injured and two years prior to the commencement of that action, the plaintiff had signed a statement for the employer describing the accident and saying: "I have no intention of suing my employer but going to take voluntary compensation". Promptly thereafter the employer began to pay compensation at the maximum rate allowed by the New York State Workmen's Compensation Law. When the required papers were filed, a clerk of the Board concluded from such papers that there might be a question of "voluntary compensation", since the defendant in the case was perhaps engaged in interstate commerce. For that reason the carrier was notified of the question, and a hearing was set by the Board. In the notice given to the plaintiff it was stated that the "Purpose of Hearing" was the "Question of Jurisdiction". At the hearing the referee of the Board announced that it concerned the "question of jurisdiction", in response to which the defendant's representative said: "No, we waive that. We are paying the man $28." At the close of such hearing an award of $28 a week was made in favor of the employee. The defendant continued to make payments pursuant to that award for about five months, when it requested another hearing, because it had been informed that the employee was able to work. On that hearing the Board made a finding that payments had been stopped, because "claimant able to work". Thereafter, on further hearing the case was reopened at the request of the employee after he had retained counsel and payments were ordered at $18 a week. Payments pursuant to that award were continued for almost two years, when the plaintiff notified the defendant that he was making a claim under the Federal Employers' Liability Act, and he had the case before the Board closed "without prejudice" (190 F. 2d at 977).

In the action under the Federal Employers' Liability Act the defendant moved for summary judgment dismissing the action on the ground that the plaintiff had waived his Federal remedies. The District Court granted the motion, and the United States Court of Appeals for the Second Circuit affirmed, holding that the plaintiff had waived, under the provisions of Section 113, his Federal rights and remedies and that under those facts Section 113 was valid and binding upon the plaintiff.

As stated above, the *Heagney* case does not support the decision of the Court of Appeals in this case. In that case there was an express agreement to pay and to accept compensation as provided by the Workmen's Compensation Law. Such an agreement cannot be found in this case.

The validity of a satisfaction and release of a cause of action under the Federal Employers' Liability Act raises, of course, a Federal question to be determined by Federal rather than State law, for only if Federal law controls, as it does, can that Act be given the uniform national application essential to effectuate its purposes. *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361 (1952), *supra*. It is contrary to established principles of law to hold that the implied "agreement" which the Court of Appeals has found in this case constitutes a valid release of a cause of action under the Federal Employers' Liability Act.

As stated above, the Congress has pre-empted the field of liability, and the States are prohibited from interfering therein. How incongruous it is then to maintain that the Congress in enacting Section 5 of the Federal Employers' Liability Act (which was considered in *Callen* v. *Pennsylvania R. Co.*, 332 U. S. 625 (1948), *supra*) intended that

causes of action under that Act could be settled by submission to State workmen's compensation tribunals, whose rules of liability are entirely at variance with the uniform rule of liability prescribed by the Congress. See *McCahan Sugar Refining & Molasses Co.* v. *Stoffel,* 41 F. 2d 651 (3d Cir. 1930), an action under the Jones Act (41 Stat. 1007, 46 U. S. C. § 688) in which a release in writing that provided for the acceptance and payment of compensation under the Pennsylvania Workmen's Compensation Act was held to be void because it was opposed to public policy in that it encroached upon the Federal maritime jurisdiction. The court there stated (41 F. 2d at 654):

> "In the case in hand the respondent tried to do what the Supreme Court has said state Legislatures cannot do. The attempt was, pari ratione, equally void. If this contract were otherwise good, it would still be bad because opposed to public policy. But aside from this vital defect, the contract, with the ingrafted release, is void for the three reasons first stated [incomplete, lacked mutuality, duration of payments depended upon another agreement to be approved by the Workmen's Compensation Board]."

A valid satisfaction and release under the Federal Employers' Liability Act presupposes a full settlement "without litigation". *Callen* v. *Pennsylvania R. Co.,* 332 U. S. 625, 631 (1948), *supra.* What is involved in this case, however, is not a settlement "without litigation" but, instead, the substitution of the Board for the proper and only forum which is provided by Section 6 of the Federal Employers' Liability Act—a Federal or State trial court with jurisdiction of the parties.

It has been suggested that a release in writing providing for the relinquishment by an injured employee of all his rights of action for personal injuries, in consideration of a fixed schedule of periodic payments such as might be specified in a State workmen's compensation act for the particular injury, would be valid: *Bay State Dredging & Contracting Co. v. Porter*, 153 F. 2d 827, 832-33 (1st Cir. 1946). Such a settlement should not be regarded as sufficient in law. But whether or not that be correct, the facts and circumstances in this case do not come within the scope of that suggestion. Here, the State seeks to impose its Workmen's Compensation Law upon the appellant. Moreover, the question of what payments are to be made and under what conditions is indefinite and subject to the vagaries of litigation before a State compensation tribunal.

CONCLUSION

The judgment below should be reversed and the proceeding should be remanded to the Board for the submission of proof as to the jurisdiction of the Board over the subject-matter of the proceeding, and the appellant respectfully submits that, in so doing, this Court should reaffirm the principles which, as this Court has heretofore held, the Congress intended should be applied in determining under the Federal Employers' Liability Act the liability of carriers for injuries to their employees while they are engaged in interstate commerce and should now eliminate the possibility of diversity of determinations through the application of State laws by holding that the only settlements of claims under that Act which shall be valid are those that

determine all questions of liability and result in a payment or definite provision for the payment of such liability in full.

November 24, 1952.

Respectfully submitted,

ALBERT R. CONNELLY,
Counsel for Appellant,
15 Broad Street,
New York 5, N. Y.

HOYT A. MOORE,
JOSEPH W. MARLOW,
Of Counsel.

APPENDIX A

Excerpts from the Report of the Joint Legislative Committee to Recodify and Revise the Workmen's Compensation Law (New York Legislative Document (1922) No. 55)

"Your Committee is of the opinion . . .

". . .

"That the insurance carrier, the employer, and the injured employee, or his dependents or representatives, may jointly waive any jurisdictional defect or inhibition of federal statute or constitution, and jointly elect the one to pay the other to receive compensation, under the provisions of the State Law. [p. 9]

". . .

"5. The United States Supreme Court has held that admiralty questions are reserved by the Federal Constitution to the United States courts; that longshoremen are engaged in, and longshore work is, admiralty service; therefore that State courts cannot exercise jurisdiction in such cases.

"But they have not held that, after an accident, all interested parties cannot elect the one to accept the others to pay compensation, in the amounts and manner provided by said statute.

"In this State a large number of the accidents of industry occur in longshore work; at the harbors, wharves, and on the rivers and canals of the State. The longshoremen and canal men generally, the employers as well, the State Fund, and many of the other carriers, are very desirous that effort be made to include such cases under our Compensation Law, so far as it is possible to do so.

"The proposed amendment will permit those who choose to elect to accept the provisions of our law to so elect, and the one to pay the other to accept compensation thereunder." [pp. 11-12]

APPENDIX B

List of State Workmen's Compensation Statutes Relating to the Subject of State Jurisdiction in Respect of Injuries in Interstate Commerce

Alabama

Code of Alabama, 1940 (Cum. Supp. 1951), Title 26, Section 263.

Arizona

Arizona Code, 1939, Title 56, Section 56-965.

Arkansas

Arkansas Statutes Annotated 1947 (Cum. Supp. 1951), Title 81, Section 81-1303.

California

Labor Code (1937), Section 3203.

Colorado

Colorado Statutes Annotated 1935 (1952 edition), Chapter 97, Section 289.

Connecticut

General Statutes of Connecticut, 1949, Title 61, Section 7460.

Delaware

Revised Code of Delaware, 1935, Chapter 175, Section 6119(49).

Florida

Florida Statutes, 1951, Chapter 440, Section 440.09.

Georgia

Georgia Code, 1933, Title 114, Section 114-108.

Idaho

Idaho Code, 1947, Title 72, Section 72-1008.

Illinois

No relevant provision.

Indiana

Indiana Acts of 1929, Chapter 172, Sections 2, 19, as amended by Acts of 1937, Chapter 214 (Burns Indiana Statutes Annotated, 1952, Title 40, Section 40-1219).

Iowa

Code of Iowa, 1950, Chapter 85, Section 57.

Kansas

General Statutes of Kansas, 1949, Chapter 44, Section 44-506.

Kentucky

Kentucky Revised Statutes, 1948, Chapter 342, Section 342.005.

Louisiana

Louisiana Revised Statutes, 1950, Title 23, Section 1037.

Maine

Revised Statutes of Maine, 1944, Chapter 26, Section 2.

Maryland

Annotated Code of Maryland (Flack 1951); Article 101, Sections 30, 31).

Massachusetts

General Laws of Massachusetts (Ter. ed.), Chapter 152, Section 1(4), as amended by Laws of 1945, Chapter 369, and Laws of 1947, Chapter 215 (Annotated Laws of Massachusetts, 1950, Chapter 152, Section 1(4)).

Michigan

Michigan Compiled Laws, 1948, Section 416.4 (Michigan Statutes Annotated, 1951, Title 17, Section 17.215).

Minnesota

Minnesota Statutes 1945, Chapter 176, Section 176.05.

Mississippi.

Mississippi Code, 1942 (Supp. 1950), Title 25, Section 6998-03.

Missouri

Missouri Revised Statutes, 1949, Section 287.110.

Montana

Revised Codes of Montana, 1947, Title 92, Section 92-805.

Nebraska

Revised Statutes of Nebraska, 1943 (Cum. Supp. 1951), Chapter 48, Section 48-106.

Nevada

Nevada Compiled Laws, 1929 (Supp. 1943-49), Section 2680.23.

New Hampshire

Laws of New Hampshire, 1947, Chapter 266, Section 2.

New Jersey

No relevant provision.

New Mexico

New Mexico Statutes, 1941, Title 57, Section 57-911.

North Carolina

General Statutes of North Carolina, 1943 (Recompilation 1950), Chapter 97, Section 97-13.

North Dakota

North Dakota Revised Code of 1943 (Supp. 1949), Title 65, Section 65-0102.

Ohio

Ohio General Code, 1934, Chapter 28b, Section 1465-98 (Page's Ohio General Code Annotated, Chapter 28b, Section 1465-98).

Oklahoma

Oklahoma Statutes, 1951, Title 85, Section 3.

Oregon

Oregon Compiled Laws, 1940, Title 102, Sections 102-1712, 102-1725.

Pennsylvania

No relevant provision.

Rhode Island

No relevant provision.

South Carolina

Code of Laws of South Carolina, 1942, Title 35, Section 7035-16.

South Dakota

South Dakota Code of 1939, Title 64, Section 64.0105.

Tennessee

Tennessee Code Annotated (Williams 1934) (Cum. Supp. 1952), Chapter 43, Section 6856.

Texas

Revised Civil Statutes of Texas, Title 130, Article 8306, Section 2.

Utah

Utah Code Annotated, 1943, Title 42, Section 42-1-89.

Vermont

Vermont Statutes, 1947, Title 40, Section 8075.

Virginia

Code of Virginia, 1950, Title 65, Sections 65-24, 65-25.

Washington

Revised Code of Washington, 1950, Title 51, Section 51.12.080.

West Virginia

West Virginia Code of 1949, Chapter 23, Section 2520.

Wisconsin

No relevant provision.

Wyoming

Wyoming Laws of 1951, Chapter 143, Section 16.